Plated Plastic Industries, Inc. *and* Amalgamated Industrial and Service Workers Union, Local 6 *and* Francisca Burgos *and* Juanita Torres *and* Maria Perez. Cases 29–CA–14598, 29–CA–14603, 29–CA–15433, and 29–CA–15522

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 9, 1992, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an exception and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent laid off several employees in retaliation for attending a union-sponsored party. Specifically, according to the judge, Local 6 held a party at the Respondent's plant on December 29, 1989, the Respondent knew that the party was sponsored by Local 6, and the Respondent laid off five employees ''for attending the Local 6 party.'' We do not agree that the record shows the Respondent knew Local 6 sponsored the party. We therefore find that the General Counsel failed to establish a prima facie case.

1. Facts

The Respondent and Local 119 were parties to a series of collective-bargaining agreements from 1975 to 1989. In September 1989 Local 6 filed a representation petition. The unions conducted election campaigns on the sidewalk in front of the Respondent's plant. Employees gathered in groups on the sidewalk to talk to each other and both unions' representatives.

After a November 1, 1989 election that was set aside, the Unions continued campaigning in preparation for a second election.[2] Two Local 6 representatives[3] brought food into the Respondent's plant for a party for employees on December 29, 1989. Because it was lunchtime, they did not ask permission.

A foreman reported the party in progress to the Respondent's owner, Nick Anis. The foreman asked why Anis was throwing a party with liquor and music. Anis investigated the report. When he saw the alcohol and food, he became extremely upset and told employees to return to work or they would be fired.

Later the same day, Anis told the supervisors there would be a mass layoff. The Respondent laid off approximately 24 employees on December 29, 1989. Some of those laid off were employees Anis believed had attended the party and been drunk.

On March 6, 1990, after the instant unfair labor practice charge was filed, the Respondent submitted a position statement.[4] The statement: (fiMDBUfl*ERR17*fiMDNMfl1)fi Region that sometime after the party and the layoffs on December 29, 1989, Local 119 had filed an unfair labor practice charge alleging that the party had been sponsored by Local 6 and that the Respondent allowed the party to influence votes in the representation election; and (fiMDBUfl*ERR17*fiMDNMfl2)fiMDBUfl*ERR17*fiMDNM alleging that the Respondent fired employees who favored Local 6. The statement continued, ''In fact, the great majority of those employees [laid off on December 29, 1989,] were fired[5] because they attended the party on company grounds and on company time . . . . where free liquor was served . . . .''

The complaint alleged that the Respondent selected eight of the employees for layoff because they supported Local 6. All had signed authorization cards and attended sidewalk election campaign meetings. Five of them—Lydia Saavedra, Jonnette Munoz, Hugo Moreta, Julia Nieves, and Francisca Burgos—allegedly had attended the December 29, 1989 party.

2. Judge's analysis

The judge found no basis in the record for concluding that employees were laid off because they had signed authorization cards or had attended sidewalk campaign meetings. The judge was unconvinced that the Respondent knew who signed authorization cards

[1] The judge found that the Respondent violated Sec. 8(fiMDBUfl*ERR17*fiMDNMfl[illegible] Act by warning employee Maria Perez that it considered her to be a poor worker since she became involved with the Local 119 negotiating committee. The judge inadvertently failed to include this finding in her recommended Order and notice. We shall conform the recommended Order and notice with the judge's finding.

We shall also modify the recommended Order and notice to require the Respondent to remove from its files any reference to Perez' layoff and to notify her that this has been done.

[2] Local 6 received a majority of votes cast in the November 1989 election. Local 119 received a majority of votes cast in the April 1990 election. After Local 6's objections were overruled, Local 119 was certified as bargaining representative in August 1990.

[3] One was former employee Maria Aguirre, whom the Respondent discharged on November 6, 1989. The judge found that the Re[illegible] General Counsel does not except to the dismissal of the 8(fiMDBUfl*ERR17*fiMDNMfla gation.

[4] The Respondent excepts to the judge's admission of this letter on the grounds that there is no evidence the letter was written by an agent of the Respondent. The exception is without merit. The Respondent's attorney at the hearing stipulated that the author of the letter was Respondent's counsel at the time the letter was written.

[5] Although the position statement used ''fired,'' the judge used ''laid off.'' Except where we quote the letter, we have used the term the judge used.

or knew from observing the sidewalk campaign meetings who favored Local 6.[6]

The judge found, however, that the Respondent discriminatorily laid off the five employees who had allegedly attended the party on December 29, 1989. According to the judge, the March 6, 1990 position statement admitted that the Respondent laid off the five employees ''for attending the Local 6 party.''

3. Discussion

Because the judge found nothing in the evidence of cardsigning or involvement in sidewalk campaigning to suggest that the Respondent had any reason to single out the five employees as supporters of Local 6,[7] her finding that the General Counsel made out a prima facie case of antiunion motivation stands or falls on evidence that the Respondent singled them out for discharge because they attended a party sponsored by Local 6. For the following reasons, however, we do not agree with the judge's finding that the Respondent laid off the five employees ''for attending the Local 6 party,'' at least insofar as the judge thereby found that, at the time of the layoffs, the Respondent knew of, and was motivated by, the Local 6 sponsorship of the party.

In her discussion of employee Lydia Saavedra (fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl by extension, the four other alleged discriminatees)fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl the judge stated:

> [Their] participation in Local 6 activities was known to Respondent because in a letter to the Region dated March 6, 1990, Respondent's then Counsel wrote that [they were] fired for participation in the December 29 party.

We are uncertain how the judge arrived at this conclusion. The letter states that Saavedra and others were laid off for attending a party on company property at which liquor was served. The letter does not state that the employees were laid off because they attended a *union-sponsored* party.

Apparently, the judge reasoned that because the March 6, 1990 position statement mentioned Local 6 in connection with the party, the Respondent thereby admitted having known on December 29, 1989, that Local 6 sponsored the party. Any such reasoning is flawed. Before the March 6, 1990 position statement was written, Local 119 had filed an unfair labor practice charge connecting Local 6 with the party. This charge is the only evidence with any bearing on the issue of when the Respondent learned that Local 6 had sponsored the party. As the charge was filed subsequent to the layoff of December 29, 1989, we conclude that the judge erred in finding that the Respondent knew on December 29, 1989, that Local 6 sponsored the party.

In sum, we find that the record contains no evidence establishing that the Respondent at the time of the layoffs knew that Local 6 had sponsored the December 29, 1989 party. Because the judge's finding of antiunion motivation in the layoff of the five employees rested solely on the Respondent's perception of their connection with the party, she erred in concluding that the General Counsel, by a preponderance of the evidence, had established a prima facie case of discrimination in the selection of these employees for layoff.[8]

Accordingly, we shall reverse the judge's finding and dismiss the allegation that the Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl on December 29, 1989.

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusions of Law 2 and 3, substitute the following as Conclusion of Law 2, and renumber subsequent paragraphs accordingly.

''2. By warning Maria Perez that the Respondent considered her to be a poor worker since she became involved with Local 119's negotiating committee and selecting her for layoff in December 1990 because she supported Local 119, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17

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[6] Concerning employee Juanita Torres, the judge stated that ''mere attendance at meetings in front of the factory is not enough to establish [knowledge of Local 6 support]; the meetings were attended by many employees.''

Concerning employee Fannie Silva, the judge observed, ''Many employees attended meetings for both unions and most unit employees signed cards for Local 6.''

Finally, concerning employee Conception Quiros, the judge found ''that these [sidewalk campaign] meetings were attended by many employees and that employees commonly went from the Local 6 group to the Local 119 group.''

[7] The General Counsel has not excepted to the judge's refusal to find that the Respondent knew who signed authorization cards or knew from observing the sidewalk campaign meetings who favored Local 6.

[8] The General Counsel's theory of the violation was that particular employees were discriminatorily selected for the 1989 layoff, not that they were merely caught up in a mass layoff that was motivated by the Local 6 campaign in general. Hence, the absence of any knowledge of these five employees' particular activities in support of Local 6 is critical. Compare *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175, 1179–1180 (fiMDBUfl*ERR17*fiMDNMfl6th Cir. 1985)fiMDB tion on mass layoff theory notwithstanding absence of evidence regarding prounion sentiments of each individual employee)fiMDBUfl*ERR17*fiMDN *Langston Cos.*, 304 NLRB 1022 (fiMDBUfl*ERR17*fiMDNMfl1991)fiMDBUfl*ERR17 basis of a discriminatory singling-out theory in the absence of evidence that the employer knew at the time of the alleged discrimination against two employees that those employees were more active in their support of the union than any other prounion employees)fiMDBUfl*ERR17*fiM

Member Devaney finds it unnecessary to rely on the citation *Langston Cos.*, as he dissented in that case. He finds the instant case to be distinguishable, however.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Plated Plastic Industries, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl.

''(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl Informing employees that their work stations are being changed so that their union activities may be placed under surveillance, placing employees under closer supervision because of their union activities, and warning employees that they are considered to be poor workers since they became involved with a union's negotiating committee.''

2. Substitute the following for paragraph 2(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl.

''(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl Remove from its files any reference to the unlawful layoff of Maria Perez and notify her in writing that this has been done and that the layoff will not be used against her in any way.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT select you for layoff because you engage in union activities.

WE WILL NOT inform you that your work station is being changed so that we can engage in surveillance of your union activities.

WE WILL NOT place you under closer supervision because you engage in union activities.

WE WILL NOT warn you that we consider you to be a poor worker as a result of your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Maria Perez immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, WE WILL make her whole for any loss of earnings and other benefits resulting from her layoff, less any net interim earnings, plus interest, and WE WILL notify her that we have removed from our files any reference to the layoff and that the layoff will not be used against her in any way.

PLATED PLASTIC INDUSTRIES, INC.

James P. Kearns, Esq., for the General Counsel.
*Martin Gringer, Esq. (fiMDBUfl*ERR17*fiMDNMfl Kaufman, Naness, Schi Rosensweig P.C.)fiMDBUfl*ERR17*fiMDNMfl*, of Melville, New York, fo spondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn and New York, New York, on April 2, 3, and 4 and May 13 and 14, 1991. The complaint alleges that Respondent, in violation of Section 8(fiMDBUfl*ERR17*fiMDNM and (fiMDBUfl*ERR17*fiMDNMfl5)fiMDBUfl*ERR17*fiMDNMfl of the Act:

1. Interrogated its employees and threatened employees if they continued to support Local 119, Brotherhood of Industrial Workers, National Organization of Industrial Trade Unions.

2. Threatened employees with loss of benefits and with plant closure if they supported Amalgamated Industrial and Service Workers Union, Local 6.

3. Kept employees' activities in support of Local 6 under surveillance.

4. Required a doctor's note from and filed a harassment complaint against employee Maria Aguirre, and assigned her more arduous duties and placed her under closer supervision to induce her to refrain from supporting Local 6.

5. Discharged the following employees because they supported Local 6: Maria Aguirre, Juanita Torres, Francisca Burgos, Lydia Saavedra, Julia Nieves, Concepcion Quiroz, Hugo Moreta, Jonnette Munoz, Fanny Elvira Silva, and Maria Perez.

6. Unilaterally changed terms and conditions of employment.

Respondent denies the material allegations of the complaint and asserts that it implemented two layoffs for economic reasons.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent in July 1991, I make the following[1]

[1] Certain errors in the transcript have been noted and corrected.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with a facility in Brooklyn, New York, is engaged in electroplating plastic products. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl2)fiMDBUfl*ERR17*fiMDNMfl, (fiMDBUfl*ERR17*fiMDNMfl6)fiMDBUfl*ERR17*fiMDNMfl, and (fiMDBUfl* and Service Workers Union, Local 6 and Local 119, Brotherhood of Industrial Workers, National Organization of Industrial Trade Unions are labor organizations within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl5)fiMDBUfl*ERR17*fiMDNMfl of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a plant that puts metal finishes on plastic items by rendering the plastic conductive so that it can be electroplated. The plant is in a very bad neighborhood, rife with prostitution, muggings, and robberies. These area conditions affect the Company: a man with a knife has come into the office and drug users have entered the plant and robbed the employees. The plant consists of three adjacent buildings, two of which are one-story garage-type structures and one of which is a four-story structure. The most convenient method of going from one building to another is to use the doors that open onto the street. Thus, it is common for workers and supervisors to walk out onto the sidewalk many times a day as they circulate among the buildings of the plant.

The owner and president of Respondent is Nick Anis. His daughter, Stephanie Anis, is the assistant plant manager and customer service manager. His wife, Marilyn Anis, works in the office.

The Company employs mostly unskilled, minimum wage workers.[2] According to the testimony of Nick Anis, these employees are not the best nor the brightest. I formed the distinct impression that Respondent has resigned itself to employing people who do not work very hard and that over the years Respondent has retained employees whom it knows to be inefficient and indifferent.

Since 1975, Respondent and Local 119 had been parties to a series of collective-bargaining agreements, the last of which had a term from December 11, 1986, to December 12, 1989.

The unit appropriate for the purposes of collective bargaining is as follows:

> *Included*: All full-time and regular part-time production and maintenance employees and drivers.
>
> *Excluded*: All other employees, office clerical employees, guards and supervisors as defined in the Act.

On September 25, 1989, Local 6 filed a petition to represent the employees in the appropriate unit. Pursuant to a stipulated election agreement, an election was held on November 1, 1989; Local 6 received a majority of the votes cast. The election was set aside on December 7, 1989, based on objections filed by Local 119, and a second election was held on April 11, 1990. Local 119 received a majority of the votes cast in this second election. After an objection filed by Local 6 was overruled, Local 119 was certified as the representative of the unit employees on August 17, 1990. As is more fully described below, Respondent and Local 119 negotiated a new collective-bargaining agreement with an effective date of January 1, 1991.

B. *Credibility of the Witnesses*

A major problem with the credibility of the General Counsel's witnesses is presented by the testimony and documentary evidence herein. All of the witnesses presented by General Counsel testified that they first heard of Local 6 and its interest in representing the employees of Respondent in October 1989. Indeed, many of those witnesses gave General Counsel affidavits in the early months of 1990 stating that they first heard of Local 6 in October 1989, and that they signed authorization cards for Local 6 in October 1989. At the instant hearing, counsel for the General Counsel introduced the authorization cards of those witnesses who had signed cards: these cards were all dated September 19 or 22, 1989. Some of the witnesses testified that they signed the authorization cards on September 19, 1989, but some others testified that they signed in October. It appears that many of these cards were dated in the same handwriting and by the same person.[3] As stated above, Local 6 filed its petition with the Regional Office on September 25, 1989. All of the cards introduced into evidence by General Counsel bear two date stamps of the Regional Office: one stamp reads ''September 25, 89'' and the other reads ''March 18'' with no year. Counsel for the General Counsel stated on the record that he was unable to explain the presence of the two date stamps, although he stated that they were both Regional Office date stamps. Counsel for the General Counsel stated that after Local 6 filed its petition and the election proceedings had ended, the authorization cards were returned to Local 6. Counsel for the General Counsel stated that he could not say that any of the authorization cards he introduced into evidence had actually been presented to the Regional Office on September 25, 1989, when Local 6 filed its petition.[4] I note that there was no testimony or statement on the record that the date stamp machines of the Regional Office are locked or secured in any way, nor was any attempt made to show how many date stamp machines are present and what are their respective locations.

The most puzzling aspect of this problem is that Maria Aguirre, the person ostensibly responsible for collecting the authorization cards, gave an affidavit to a Board agent on February 12, 1990, in which she described in great detail her efforts to collect cards for Local 6 beginning in October 1989. However, Aguirre testified at the instant hearing that she collected all these cards before September 20, 1989.

Counsel for the General Counsel's purpose in introducing the testimony of the employees who signed cards for Local 6 was to show that these employees supported Local 6 and that they had been discharged as a result of this support.[5] The discrepancies in the employees' testimony is relevant to

[2] At various times, there have been from 72 to 110 unit employees.

[3] Many of the witnesses testified that they did not date their own cards.

[4] The Regional Office does not retain copies of the authorization cards.

[5] Respondent contends that it laid off a number of employees for lack of work in December 1989, and then again in December 1990.

the witnesses' credibility: if an employee testified that he signed a card on a date that is inconsistent with the employee's testimony as to the date he first learned of the Union, one may conclude that the employee does not have a good recollection of his activities during the period of time related to the union campaign. One may also be moved to doubt whether the employee is testifying accurately as to the union meetings he attended and other union activities he purportedly engaged in.

As will be discussed in detail below, several conclusions can be drawn from the obvious conflicts between the dates written on the authorization cards and the testimony of the employees who signed cards. It is possible that the cards were indeed signed on September 19, 1989, and that all the employees were wrong when they gave affidavits and testified that they first heard of Local 6 in October 1989. In this case, it would seem that those witnesses who signed cards in September 1989, but testified that they did not hear of Local 6 until October, gave inaccurate affidavits and testimony and thus had no clear recollection of the events of fall 1989. It may also be possible that all the witnesses were in collusion when they gave their uniformly inaccurate testimony. It is also possible that the cards were not signed on September 19, 1989, but that the date was inaccurately written on the cards and that an incorrect date stamp was placed on the cards at a later time. In this scenario, the witnesses would be correct when they gave affidavits and testified that they did not hear of Local 6 until October 1989. However, since these witnesses also testified that they signed cards on September 19, 1989, their testimony is contradictory and suspect for that reason.

C. *Alleged Unlawful Acts Involving Maria Aguirre*

Background

Maria Aguirre began working for Respondent in 1984; at some point she became the shop steward for Local 119. In the fall of 1989, Aguirre was working on the second floor of the plant putting plastic items on racks so that they could be taken through the electroplating process. Aguirre had worked in other areas of the plant at various times, including two separate assignments on the first floor.

On her direct examination by counsel for the General Counsel, Aguirre testified that she had sometimes been late to work because she had to take her daughter to day care. She had sometimes been absent because she had obstetric checkups every 2 weeks and she did not come to work on days when she had medical appointments. Aguirre stated that when she was out sick she called to inform Respondent. According to Aguirre, other employees have been late on occasion but Anis only ''made a fuss'' on those occasions when she was late. On cross-examination, Aguirre stated that before Local 6 came on the scene she never had problems with Anis over tardiness and absenteeism, she had problems only with her foreman Joe Washington. But when pressed further, Aguirre acknowledged that she received written warnings from Anis on July 27 and September 12, 1989. Further, Respondent introduced into evidence written warnings to Aguirre dated July 1984 for absenteeism; August 1984, for excessive breaktime; August 1987 for excessive absenteeism; and February 1988 for tardiness and absenteeism. The 1988 notice was apparently intended to be a final warning but the record does not disclose that any further steps were taken with respect to this notice.[6]

Nick Anis testified that after some time Aguirre's work had become very slow; she was sloppy and uncooperative. Anis spoke to Pedro Cortez, a Local 119 business agent, about this situation; Anis complained that Aguirre was inefficient, that she was rude, and that she made threats. Cortez told Anis that he was crazy and not to pursue the problem with Aguirre. At the end of 1988 or the beginning of 1989, Anis spoke to Joseph Merino, secretary-treasurer of Local 119, about his problem with Aguirre and said that he wished to terminate her employment. When Merino told Anis to fire Aguirre, Anis replied that it was not so easy because Aguirre and Cortez were often seen together. Merino said he would speak to Cortez about the matter. Once Cortez was no longer employed by Local 119, Anis again pursued the problem of Aguirre. He sent three letters dated July 27, 1989, to Local 119 asking the Union to help him deal with Aguirre. One letter complained that Aguirre had been extending her 15 minute breaks to one-half hour and that she did not call in sick or present a doctor's certificate when she was absent. The second letter informed the Union that Aguirre had been disrespectful to Anis when he attempted to correct her behavior, and demanded that an apology be issued and his authority be recognized. The third letter detailed excessive absenteeism and tardiness and enclosed the relevant timecards.[7] In addition, on July 27, Anis gave Aguirre a written warning notice for lateness and absenteeism informing her that under the Local 119 contract she could be discharged after three notices. Anis testified that he wanted to discharge Aguirre and that he was beginning the process by means of the three letters. On September 12, 1989, the Company sent Aguirre a second warning notice for attendance problems.[8]

On October 6, 1989, Respondent issued a third late and absent warning notice to Aguirre, stating that, ''The third warning notice according to the Union contract, means termination of employment.'' A copy of the notice was given to Local 119; attached to the notice were copies of Aguirre's timecards from June, July, August, and September 1989. The record does not disclose what happened with respect to the warning notice from October 6 until the events of November 6, 1989.[9]

Aguirre testified that in September 1989, she signed an authorization card for Local 6. According to Aguirre, after she spoke to Armondo Ponce, the president of Local 6, she distributed cards to her fellow employees and collected about 80 signed authorization cards which she returned to Local 6 on September 20, 1989.[10] Aguirre testified that she spoke to employees about signing the cards at lunchtime, during her breaks, or at other times outside the plant, and she stated that

[6] At this time, Aguirre's last name was different and the warning notices refer to her as Maria Avenancio.

[7] Copies of these letters were given to Aguirre.

[8] Anis could not recall whether he knew that Aguirre was involved with Local 6 at this time. However, in view of the other testimony from Anis and Aguirre, it seems unlikely that Anis knew about Local 6 on September 12, 1989.

[9] On that day, Respondent gave Aguirre a third warning notice and discharge for chronic absenteeism and lateness.

[10] Ponce had formerly been an organizer and business agent for Local 119. Another Local 6 employee, Pedro Cortez, was also a former Local 119 agent.

no one in management saw her solicit cards from other employees. As noted above, Aguirre's affidavit given in February 1990, places all these events in October 1989.

In questioning on direct by counsel for the General Counsel, Aguirre testified that she conducted meetings outside the plant where she spoke in favor of Local 6. ''Mostly everybody'' went to the meetings and the whole factory listened to what she had to say.[11] The meetings were held in front of the plant, 10 or 12 feet from the entrance. A total of 10 meetings took place both before and after the first election; the meetings were held on Friday beginning in September.[12] In her affidavit given to a Board agent, Aguirre did not refer to any meetings held right outside the plant; rather she stated that employees met in a restaurant around the corner from the plant. As mentioned above, Aguirre's affidavit states that she began her activities on behalf of Local 6 in October 1989. On recross-examination by counsel for Respondent, Aguirre changed her testimony to say that only 10 employees joined the meetings in front of the factory, rather than all the employees; these were the same people who were laid off by Respondent. Given Aguirre's difficulty recalling when events took place and the inconsistencies in her testimony and affidavit, and in view of the testimony of the other witnesses, I find that open meetings of employees and Local 6 did not begin until some time in October. I also find that numerous employees attended these meetings, as is more fully described below.

Interrogation

Aguirre testified that Nick Anis called her into his office and asked if she knew of any local union that was trying to get in or anybody who was filling out cards.[13] When Aguirre denied any knowledge, Anis asked her to let him know if anyone signed cards. Aguirre said she would do so. Aguirre's affidavit given to a Board agent on February 12, 1990, states that Anis ''said he knew that another union was trying to get into the shop and he asked me if I knew who was getting the signatures.'' The affidavit states that Aguirre responded that she did not know.

Nick Anis testified that he first heard about Local 6 when he received a letter from the NLRB to the effect that Local 6 had filed a petition.[14] Later, Anis noticed that there was activity on the sidewalk outside the plant. Anis spoke to Local 119 Shop Steward Maria Aguirre about the situation. He told Aguirre that he had a letter about Local 6 and asked her if there was something going on and if people were signing cards. Aguirre said there was nothing going on and that nobody was signing cards.

In addition to Anis' admission, I credit Aguirre's testimony insofar as it is consistent with her affidavit that Anis wanted to know who was collecting signatures.[15] General Counsel contends that this interrogation by Anis was unlawful. Under the standards announced in *Rossmore House*, 269 NLRB 1176, 1177 (fiMDBUfl*ERR17*fiMDNMfl1984)fiMDBUfl*ERR17*fiM 1985)fiMDBUfl*ERR17*fiMDNMfl, the Board will find that an interrogation if ''under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.'' In *Rossmore*, the Board found no violation where an employer questioned an open union supporter about his union sentiments. The instant case differs somewhat; here, Anis asked Aguirre, the shop steward for Local 119, whether employees were signing cards for another local. Aguirre was an open union activist since she had been shop steward for Local 119. Anis had just received notice of the Local 6 petition and he did not know that Aguirre supported Local 6; instead, he had good reason to believe to the contrary given Aguirre's position with Local 119. Anis was surprised to hear that another local was organizing his employees and he asked one who would be expected to know about union matters what she knew about the situation. When Aguirre denied knowledge, Anis ended the conversation. Counsel for the General Counsel has not explained how Anis' interrogation tended to interfere with, restrain, or coerce. Although Anis was the owner of the plant, the circumstances show that his question was a casual question and that he did not press Aguirre for information once she said nothing was going on. Further, as shop steward, it would be expected that Aguirre would often discuss matters of interest to management and Local 119 with Nick Anis. Anis did not make threats to Aguirre about any employees who might have signed cards or the person who was collecting signatures for the other local nor did he indicate that he had any reason for seeking information other than surprise that another union was active in the plant. Certainly, there is no evidence that Anis believed that Aguirre supported Local 6 and that he was seeking to coerce her in her activities. See *Bourne v. NLRB*, 332 F.2d 47 (fiMDBUfl*ERR17*fiMDNMfl2d Cir. 1964)fiM that the interrogation was unlawful.

Change of Work Station and Medical Note

A few days after Nick Anis questioned her about a new union, according to Aguirre, he came up to the second floor and said that Local 119 had told him to put her to work on the first floor so that he could keep an eye on her. Aguirre testified that her new work station was in front of the office which has glass windows. Aguirre described her new tasks on the first floor as a job ''I don't think was worth doing.'' In her new job, Aguirre removed parts from racks and put them into boxes. Four times a day, Aguirre had to lift a rack of parts weighing 10 pounds. Aguirre testified that she was 6 months' pregnant at the time, and the racks were too heavy for her. Aguirre complained to the first floor supervisor, Olga Castro, that she could not lift the racks, and for a while Castro gave her different tasks to perform. On the day that Aguirre complained to Castro that she could not lift the racks because she was pregnant, Nick Anis asked Aguirre to bring

[11] Aguirre stated that there were about 40 people on each shift when she was conducting the meetings.

[12] The first Friday after the filing of the Local 6 petition was September 29, 1989.

[13] Aguirre did not specify when this incident occurred, but based on all the testimony and evidence I conclude that it was before Aguirre became an open supporter of Local 6 and freely identified herself with the Local 6 organizers.

[14] Anis did not testify when this occurred. Local 6 filed its petition on September 25, 1989.

[15] I credit Aguirre's affidavit which was given closer in time to the events; Aguirre had trouble recalling dates and her recollection of events was often inaccurate. I do not find that Anis asked Aguirre to seek any further information, but merely whether she knew who was behind the new union's effort.

a note from her doctor stating that she was able to work. Then, Anis again told Aguirre to work in front of the office.[16]

Nick Anis testified that after the September 12 warning notice, he transferred Aguirre from the second floor to the first floor because her supervisor, Joanna Benn, told him that Aguirre was uncooperative and difficult to handle.[17] Further, Aguirre had threatened Benn with a razor or a knife in the past. Anis denied telling Aguirre she was transferred so that he could keep an eye on her. When asked if he moved Aguirre because Local 119 asked him to do so, Nick Anis said, ''I don't recall if I did.'' At another point in his testimony, Anis said that after he heard that Aguirre had threatened Benn, he decided to have Aguirre work on the first floor. Anis also stated that Aguirre was moved because of ''inefficiency.''

Anis thought the work on the first and second floors was of equal difficulty. On the first floor, a male worker places a rack full of plated parts in front of a female worker who removes the parts from the rack, inspects the parts, and places them in boxes. Then, the women take empty racks and put them on the conveyor to be cleaned. An empty rack is lighter than a full rack. Further, sometimes there are no racks for several hours as the number of racks varies from 2 to 20 per day. On the second floor, according to Anis, there is more physical exertion required of female employees. They must take parts and place them on racks and the employees average three to five racks per hour. Although the women do not carry the racks around the floor, they may be required to lift a rack from one table to another.[18]

Benn testified that she had problems with Aguirre's work because Aguirre did what she wanted to do, not what Benn told her to do. Aguirre was a person who would make trouble and she did not care about her supervisor's requests. Benn testified that about 1-1/2 or 2 years before Aguirre stopped working for Respondent, she had threatened to cut Benn and Benn had called the police and filed a complaint. This incident took place sometime in 1987. Benn stated that she did not ask that Aguirre be transferred to the first floor, and she could not recall why Aguirre was transferred.[19] Benn was aware that Aguirre was involved in the election. She stated that Aguirre made employees sign a paper and told them it was for Local 119, but Aguirre deceived the employees because she wanted Local 6 to be successful.

After Aguirre was moved to the first floor, according to Nick Anis, Supervisor Olga Castro informed him that Aguirre's work was slow and that Aguirre was uncontrollable. Anis spoke to Aguirre who informed him that she had a high risk pregnancy. Anis replied that if she could not do the job she should go on disability. He also asked Aguirre for a medical certificate stating that she could perform her job.

I have noted above that Aguirre's testimony is not very reliable because it is shifting and full of inconsistencies. Further, Aguirre was imprecise and even inaccurate as to dates and she denied facts which were proven by documentary evidence. However, with respect to Aguirre's testimony about her move from the second to the first floor, her testimony is consistent with her affidavit that Nick Anis told her that the move was in response to a Local 119 request and so that he could keep an eye on her. Further, the testimony of both Aguirre and Anis places this move at a time after Anis was aware that employees were engaging in activities in support of Local 6. And Anis' explanations of the reasons for moving Aguirre to the first floor were shifting; he stated that it was because Benn could not control Aguirre and because Aguirre had threatened Benn, and then he stated that Aguirre was transferred because of inefficiency. But Benn could not recall asking for Aguirre to be removed from the second floor and she testified that the threats had taken place in 1987. Finally, Anis said that he could not recall whether Local 119 had asked that he keep an eye on Aguirre. I have decided to credit Aguirre's testimony that Nick Anis told her that she was being put to work in front of the office on the first floor because Local 119 had requested this action and so that he could keep an eye on her. Thus, I find that Respondent changed Aguirre's assignment so that it could put her activities in support of Local 6 under surveillance and that Respondent informed Aguirre of this purpose. Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMD
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said he wanted to keep an eye on her. The record shows that Aguirre worked in front of the glass office and I shall infer that Anis and other members of management were able to observe Aguirre directly during the workday. Thus, I find that Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*E
ing Aguirre under closer supervision.

I do not find that General Counsel has shown that the duties required of Aguirre on the first floor were more arduous and less desirable than those she had performed on the second floor. Although Aguirre testified that she had to lift racks weighing 10 pounds four times a day on the first floor, Nick Anis described the comparative duties of the first and second floors in much greater detail. Anis showed that there was more lifting on the second floor, and I credit Anis that the work on the second floor was more physically taxing than the work on the first floor. It is clear that Aguirre did not like to work on the first floor because she did not think the job was worth doing. But Aguirre had twice before worked on the first floor and she presented no credible and objective basis for a finding that her duties on the first floor were less desirable than those she had performed on the second floor. Indeed, the duties of both floors seem remarkably similar.

Similarly, I do not find that Nick Anis unlawfully required Aguirre to bring a medical note. There is no dispute that after Aguirre was moved to the first floor she complained to Supervisor Castro that the work was too arduous because she was undergoing a high risk pregnancy. Faced with such a claim, any prudent employer would immediately request that the employee bring medical clearance to continue performing her duties. General Counsel has not shown that the request

[16] Aguirre's doctor gave her a note stating that she was fit for work.

[17] According to Anis, Benn was a ''lead girl'' and later became a supervisor. Benn identified herself as the supervisor on the second floor.

[18] Employee Luisa Cuas testified that she works on the first floor. Although she occasionally moves racks and boxes, Cuas testified that these are not heavy.

[19] I find that Benn was a truthful witness and I shall rely on her testimony. Although Benn was called to testify by Respondent, she did not seem to shade her testimony and she answered candidly when she could not recall an event about which she was questioned.

for a doctor's note was prompted by Aguirre's activities on behalf of Local 6.

Election and Discharge of Aguirre

According to Nick Anis, once the election campaign began in earnest, the efficiency of the workers in the plant declined by half while employees walked around and talked to each other. One day he saw Armando Ponce with Cortez and a woman in front of the plant. Employees were milling around this group. At some later time, Anis saw Aguirre with the Local 6 supporters.[20] Then, Local 119 also came to the sidewalk in front of the plant to talk to the employees, and Anis saw that employees were talking to both groups of union representatives. People were walking around discussing the two unions and, according to Anis, the employees would not listen to him and became uncontrollable. The Respondent's number of rejects went up, the Company lost major customers because it could not deliver the goods specified in its contracts, and sales went down about 25 to 30 percent.

Nick Anis testified that he did not make a note of which employees attended the sidewalk meetings conducted by each of the two rival unions. He testified that he did not care which local won the election; he did not think he would have to give more money to one union than to the other.

On October 17, 1989, before Anis had retained labor counsel, he wrote to Local 119 in response to its proposal for a new collective-bargaining agreement. In his letter, Anis complained that production and sales had declined and that the Company had expended large amounts of money in order to bring itself into compliance with city and Federal pollution and water usage regulations. Respondent had apparently been fined substantial amounts for past violations. Anis mentioned that another problem affecting production was that, ''the Employees utilize their time trying choose [sic] which union they want to represent them for the new union contract slated for December 12 1989.'' Anis went on to state that employee costs were very high and that Local 119 should take the Company's difficulties into account in planning for negotiations for a new contract.

Nick Anis stated that at first he did not know that Aguirre supported Local 6 because she was still the shop steward for Local 119. Right before the November 1 election, Merino and Pepper from Local 119 came to the plant and gave Aguirre a letter. He learned that Local 119 was going to bring Aguirre up on charges because of her support for Local 6 and that she had been removed as shop steward for Local 119. However, this testimony is contrary to Anis' other statements that during the campaign he saw Aguirre with the group that supported Local 6.

Aguirre testified that her first day back at work after the Wednesday, November 1 election was Monday, November 6.[21] On that day, she went up to the second floor wishing to resume her former tasks there. Foreman Emil Jiminian told Aguirre that Nick Anis wanted her to work on the first floor, but Aguirre had gone to the second floor because Armando Ponce had told her she could resume her old job. When Aguirre went downstairs Anis told her that it was up to him to decide where Aguirre should work. Aguirre replied that Ponce had informed her that she could go back to her old job if Local 6 won the election. Anis said that Ponce was nobody and that he was not ''in'' yet. Then, Aguirre went back to her work on the first floor in front of the office. Sometime after this, the police came to the plant and Anis fired Aguirre after the police had taken her name. According to Aguirre this was the first time the police were ever called on her account; she had never threatened Supervisor Joanna Benn and Benn had never called the police.[22]

Nick Anis testified that he finally fired Aguirre due to her absence and tardiness. According to Anis, on the day he discharged Aguirre, she reported to the second floor instead of the first floor where she had been assigned to work. Benn came over to Anis looking nervous and told him that Aguirre was up on the second floor. When Anis asked that Aguirre be sent downstairs, she refused to cooperate. Then Anis went upstairs and asked Aguirre what was going on. She replied, ''This is where I work from now on. . . . Ponce told me I could work up on the second floor from now on.'' Anis protested that he did not have a union contract with Ponce and after some further persuasion, Aguirre went down to the first floor. Anis stated that he fired Aguirre because she had not been to work for 2 days and then when she showed up she acted as though she were the owner and could decide where she was to work. Anis testified that he had wanted to fire Aguirre for some time but had not done so because he was afraid she would burn the place down. Then Anis stated that since he was firing Aguirre in accordance with the Local 119 contract, if she were going to burn the place down she would have to burn down Local 119 too. Anis said that he called the police when he fired Aguirre because he feared for his safety. Anis believed that she was involved in robberies at the plant, other workers have told him that they feared that Aguirre would cut them and he has seen Aguirre on the street with undesirable people.

Local 119 took Aguirre's discharge to arbitration. Aguirre testified at the arbitration that she was often late and absent because she had a high risk pregnancy and went to the doctor. The arbitrator sustained the discharge. No mention was made during that proceeding of Aguirre's union activities.[23]

In deciding whether Aguirre's discharge violates the Act, it is necessary to recognize that Aguirre was not a satisfactory employee. Beginning in 1984, Nick Anis had been issuing warning notices to Aguirre, and his uncontradicted testimony shows that he had spoken to Local 119 officials about firing her. I credit his testimony that he could not terminate her employment because her job was protected by Cortez. However, in 1989 Anis again began the warning notice process which could lead to discharge. On July 27, Respondent issued the first set of warning notices and on September 12, before Anis learned of Aguirre's activities on behalf of Local 6, he issued a second warning notice. Then, on October 6, Anis issued a third notice. Anis did not explain why he did not act on this third notice and General Counsel urges that

[20] Anis was not specific as to dates in his testimony.

[21] At first, Aguirre had maintained that she was not absent for 2 days immediately following the election. But Aguirre's timecards show that Aguirre was absent Thursday and Friday, November 2 and 3, 1989. Further, Aguirre's affidavit states that she did not return to work until the Monday after the election.

[22] I do not credit this testimony of Aguirre about the incident with Benn. As I have stated before, Aguirre was not a reliable witness, and Benn was an impressive witness.

[23] No argument for deferral has been made herein.

Anis condoned Aguirre's behavior by failing to discharge her promptly. General Counsel argues that Respondent finally fired Aguirre on November 6 when Anis realized that her efforts on behalf of Local 6 had helped Local 6 win the first election.

In the absence of a reason being provided by Respondent to explain why Anis did not discharge Aguirre after he issued the third warning notice on October 6, I must agree that the evidence shows that Nick Anis did not intend to discharge Aguirre from October 6 to November 6. Further, even on the morning of November 6, after Aguirre had been absent for the 2 days following the election, it seems that Anis had not determined to discharge her. He did not instruct any supervisor to call Aguirre to his office so that he could discharge her the moment she appeared. However, once Anis learned that Aguirre had arrogantly gone to the second floor and asserted her right to work there in defiance of his authority, Anis did discharge Aguirre. The evidence shows that when Nick Anis confronted Aguirre on the second floor and she said that Ponce had told her she could work there from now on, this was the proverbial last straw. Although the record shows that Nick Anis harbored hostility to Aguirre, it is hard to separate the hostility he felt to an unsatisfactory employee from the hostility he felt toward the employee who was active in bringing Local 6 to the plant. Many times during his testimony, Anis spoke of ''chaos'' while the two competing unions attempted to gain support among the employees, and he emotionally described that production declined and employees did nothing but walk around and talk about the two unions. Manifestly, Nick Anis blamed Aguirre, at least in part, for his difficulties. Thus, I find that General Counsel has made a prima facie case that a motivating factor in the discharge of Aguirre was her support of Local 6. However, I find that even if Aguirre had not supported Local 6, Nick Anis would have discharged her on November 6.[24] Anis had complained in writing before that day concerning Aguirre's challenges to his authority in the plant. When confronted with Aguirre's bare assertion that from now on she would work on the second floor, Anis was once again being faced with a challenge to his ability to direct the work force. I am convinced that he would have fired Aguirre when she told him that she would henceforth work on the second floor even if Aguirre had not been active on behalf of Local 6. Anis testified that on November 6 Aguirre acted as though she were the owner of the plant. This final action on Aguirre's part led Anis to risk the trouble he knew would come once he discharged Aguirre. In summary, I do not credit Anis that he fired Aguirre for being late and absent, but I do credit him that he finally fired her for challenging his instructions as to her work location and telling him where she would work in the plant. Respondent did not violate Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(6MDBUfl*ERR17*fiMDNMfl3)6MDBUfl*ERR17*fiMDNMfl when it discha

I do not find that Respondent violated the Act when Nick Anis called the police before he was discharging Aguirre. Aguirre had once threatened to cut a supervisor. Furthermore, the police were often summoned to the plant, which was in a violent area, and Anis believed that Aguirre was unpredictable and uncontrollable.

D. *Preelection Meetings*[25]

Nick Anis testified that he conducted a number of meetings with groups of 10 or 20 employees before the first election. According to Anis, he told the employees that he did not care which union won the election; he only cared that plant productivity was down because nobody was paying attention. Anis told the employees that it did not matter to him whom they voted for or if they voted in the election at all. Even without a union, Anis would do the best he could. Anis denied ever telling the employees that he would close the plant if Local 6 won the election.

Employee Hugo Moreta testified on behalf of General Counsel that at a preelection meeting Anis told the employees that the Company was experiencing difficulties and that if either union ''comes into the company'' he would not accept any of the conditions. Anis said the employees should vote for a medical plan that the Company was offering. I do not credit Moreta. General Counsel does not allege that Respondent threatened employees that selection of a union would be futile in that Respondent would not bargain with the representative of the employees. Nor does General Counsel assert that Respondent promised the employees a medical plan if they rejected either or both of the unions. No other witness testified that Anis said anything about a medical plan. I find that Moreta is not a reliable witness.

Employee Jonnette Munoz testified on behalf of General Counsel. He stated that before the election Nick Anis called the employees together. Anis said that he knew the employees wanted to switch unions but the local that would be brought in would ask for benefits he could not afford and he would have to close the Company. Anis said it would be better if employees voted for Local 119. According to Munoz, Moreta was in the group at this meeting. Employee Fannie Silva was called by counsel for the General Counsel and testified that Anis conducted an employee meeting at which he discussed the two unions. Anis stated that the unions could offer them many things ''but it also depended on whether he would agree to them or not.'' I find that the testimony of Silva is more reliable than that of Munoz. Although Munoz and Moreta both attended the same meeting, Moreta did not corroborate Moreta's testimony that Anis threatened to close the plant. Further, no other employee in the unit testified that Anis threatened to close the plant. Finally, Silva impressed me as a witness who took some care with her testimony and testified only to matters she could recall. Silva did not testify that Anis threatened plant closure.

I find that General Counsel has not made a prima facie case that Nick Anis threatened employees unlawfully at preelection meetings.

E. *Alleged Unilateral Changes*

Joseph Merino, secretary-treasurer of Local 119, testified that after the collective-bargaining agreement expired on December 12, 1989, there were no negotiations for a successor agreement. Merino stated that he had been told by someone from the Regional Office to stay away from the boss because of the pending representation case. On December 11, 1989,

[24] *Wright Line*, 251 NLRB 1083 (fiMDBUfl*ERR17*fiMDNMfl1980)fiMDBUfl*ERR17*fiMDNMfl, enfd. 662 F.2d 899 (6MDBUfl*ERR17*fiMDNMfl1st Cir. 1981)fiMDBUfl*ERR17*fiMDNMfl, cert. denied 455 U.S. 989 (fiMDBUfl*ERR17*fiMDNMfl1982)6MDBUfl*ERR17*fiMDNMfl, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (fiMDBUfl*ERR17*fiMDNMfl1983)fiMDBUfl*ERR17*fiMDNMfl.

[25] The brief filed by counsel for the General Counsel does not deal with the complaint allegation relating to preelection threats by Respondent, but I assume that General Counsel has not abandoned this allegation.

Merino visited the plant and collected the union prescription cards from the unit employees. He did not want employees to use the cards since the Union would not be receiving any contributions from the employer.[26] Merino told the employees there was no longer a contract after December 12.[27] On the same day, Merino told Anis that there was no contract and that until the election was over he would have nothing to do with Anis. When Anis asked what Merino meant, Merino said that Anis could do whatever he wished, ''we are not here anymore.''[28]

On December 19, 1989, Anis sent a letter to employees stating that the Company was experiencing financial difficulties arising from the costs of litigation connected with the election and the discharge of Aguirre, from a decline in production, and from a decrease in customer orders. The letter cited the fact that there was no union contract and concluded by announcing a series of reductions in holiday and overtime pay, increased hours, and a cessation of benefits. Anis testified that when he sent the letter Respondent had no money and that he wanted to keep the doors of the plant open.

General Counsel argues that Local 119 did not make a clear and unmistakable waiver of its right to bargain over changes in the terms and conditions of employment. Respondent urges that Local 119 did clearly and unmistakably waive its right to bargain over changes in terms and conditions of employment and disclaimed interest in representing the employees. Respondent points to the fact that Merino told both the employees and Nick Anis that the employees had no more benefits because the contract had terminated, and told Anis that the Union was not there anymore and Anis could do whatever he wanted. Respondent urges that it is significant that Local 119 did not file unfair labor practice charges over the unilateral changes and that the new contract negotiated by Local 119 and the Company with an effective date of January 1, 1991, condoned the changes made in December 1990.

Neither counsel for the General Counsel nor Respondent has called my attention to any prior case that is factually similar to the instant case on the issue of unilateral changes. Nor have I found any case on point. Both parties agree that in order for the waiver of the right to bargain by Local 119 to be found valid, that waiver must be clear and unmistakable. Here, Local 119 did not disclaim interest in the unit because it was participating in the representation procedure leading to the rerun election. However, Local 119 told the owner of Respondent and the unit employees that there was no more contract, that no more benefits would be provided to the employees, that the employees had no more union and that the Respondent could do anything it wished because ''we are not here anymore.'' It would be hard to imagine a more clear and unmistakable waiver than that. Local 119 told Nick Anis that he could do anything he wanted and that there was no union for the unit employees. Under these factual circumstances, Anis was justified in believing that Local 119 had waived the right to be informed about and bargain over proposed unilateral changes. Thus, I find that Respondent did not violate Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17 tuted unilateral changes in December 1989.

F. *The Party of December 29, 1989, and the Layoff*

Background

Aguirre testified that after she was fired on November 6, 1989, she went back to the plant on Fridays to meet with the employees. On December 29, Aguirre and Ponce brought turkey and soda to the plant. They gave the food to Francisca Burgos in order that Local 6 could offer Christmas food to the employees. Aguirre stated that no one asked permission to bring the food into the plant because it was lunchtime. Although the lunchroom is on the second floor, the food was brought up to the fourth floor.

Nick Anis testified that on December 29, 1989, at about 1 or 1:30 p.m., a foreman came to him and said he did not understand why Anis was throwing a party on the fourth floor with liquor and music. Anis went up to the fourth floor with the foreman and Supervisor Emil Jiminian; he saw 20 to 40 people consuming liquor, beer, champagne, food, and sodas. Although General Counsel's witnesses denied that there was any alcohol at the party, Jiminian and employee Luisa Cuas each testified that there was beer and champagne at the party.[29] Anis was extremely upset and threw the food on the floor; he told the employees that if they did not go back to work they would be fired.[30] It is not clear from the record whether all or some of the employees attended the party on their lunch breaks, but it appears that at least some of the employees had overstayed their lunchtimes in order to remain at the party.

Later, Anis told his supervisors that there would be a mass layoff, and he told them that he wanted to know which employees looked drunk or were not working and not paying attention. Anis stated that he laid off the employees without regard to seniority in order to get rid of the least productive employees, the workers who had attended the party and looked inebriated and those with a history of absenteeism and tardiness.[31] Anis conceded that he could not recall by the time the instant hearing took place the names of any employees who were at the fourth floor party. He also conceded that his supervisors did not keep records of how fast employees worked because Respondent cannot afford that kind of

[26] Merino did not expect Respondent to contribute to the funds after the collective-bargaining agreement expired and he did not ask for any contributions.

[27] Employee Maria Perez testified that when Merino took the benefit cards from the employees he said the contract had terminated, that the employees would not have a union, and that they were not covered by any benefits.

[28] After Local 119 won the second election, it negotiated and signed a new contract with Respondent. The contract had an effective date of January 1, 1991. Except for vacation checks due in 1990, the new contract waived all benefits under the contract that had expired in 1989; benefits were to recommence in 1991. The new contract did not provide for any retroactivity and the parties thus ratified the unilateral changes made by the Company in December 1989.

[29] Cuas stated that she was on the fourth floor during her lunch break; she was not disciplined for being at the party.

[30] Although General Counsel presented testimony that employees on the second floor exchanged Christmas presents every year, there is no basis for concluding that they held a party during working hours similar to the one on December 29, 1989.

[31] Anis did not testify that mere attendance at the party was enough to warrant discharge. Nor did Anis tell all the employees at the party that they were discharged or laid off. Apparently only employees who looked drunk and could therefore not perform their work after the party were to be laid off.

recordkeeping. But Anis maintained that his supervisors knew what was a reasonable level of production for the employees. Anis testified that about 40 employees were laid off during a period of 2 weeks both before and after the party.[32] The entire afternoon shift was eliminated. Anis said, ''We no longer had a union and I had to do something.'' The statement of position submitted by Respondent's counsel dated March 6, 1990, discussed those employees named in charges filed against Respondent and gave a reason for termination for each of them.[33] As to several, the letter stated, ''Fired on December 29, 1989 for participation in a party where free liquor was served on company time and premises.''[34] The letter makes no mention of a layoff for economic reasons; it asserts that Respondent had the right to discharge its employees and make unilateral changes because the old contract had expired and there was no duty to bargain with either competing union.

Anis testified that he had no information about who did or did not vote in the election. He contended that no one reported to him which employees talked on the sidewalk with Local 6 or Local 119.

General Counsel presented the testimony of Maria Perez concerning the 1989 layoff. Perez, who began work at the plant in December 1988, worked on the fourth floor checking the quality of incoming plastic items. At various times, Perez has worked on the first floor removing finished pieces from the racks and packing them, and she has worked on the second floor. According to Perez, the good workers were moved around the factory. Perez testified that before the election, Olga Castro told her not to vote for Local 6 because it was no good. Perez also stated that ''people'' on the floor were commenting that ''they'' were going to throw a lot of people out of work. Perez did not explain who the people were. After the layoff in December 1989, according to Perez, Castro told her that the people had been dismissed because they were with Local 6. In Perez' affidavit given to a Board agent on January 30, 1991, she quotes Castro as saying: ''see how good Local 6 is, all the people are out because of Local 6, Local 6 is not going to help them.'' Perez stated that she had attended meetings held by Local 6 and that some workers talked to both unions. Perez was not laid off in 1989, but she was laid off in December 1990. She testified that after she was laid off, some people told her to go to the Board office and that she could get backpay if she were successful. Perez was evasive when asked about the circumstances pursuant to which she gave her affidavit to a Board agent. I formed the impression that she did not want to testify about the affidavit or what led her to recall in 1991 the events of December 1989. I have decided not to credit Perez' testimony about Castro's alleged statements in December 1989.

First Floor Supervisor Castro testified that she did not speak to Perez about the election and she denied telling Perez that Local 6 was no good. Castro stated that at the time of the December 1989 layoff she and Perez worked different hours and in different locations. Castro denied telling Perez that employees were laid off because they supported Local 6. I credit Castro. Her demeanor while testifying was forthright and impressive and I find that she was a reliable witness.

Lydia Saavedra

Lydia Saavedra testified that she was laid off by Anis; he told her that work was slow; he did not mention drinking or the party. Saavedra stated that she did not go to the party on the fourth floor even though Supervisor Olga Castro told her that Local 6 had provided a lunch and that she should go upstairs and save the cost of a lunch.[35] Saavedra maintained that she ate lunch in her car on December 29; she usually eats in her car and not in the second floor lunchroom. In support of General Counsel's contention that she was laid off because she supported Local 6, Saavedra testified that she signed an authorization card for Local 6 and attended several union meetings. Saavedra stated that she signed the card on September 22, 1989, and gave it to Aguirre. Her authorization card introduced into evidence is dated 9–22–89 and it is date stamped by the Regional Office with the dates September 25, 1989, and March 18. Saavedra's affidavit given to a Board agent in February 1990 says that she first learned about Local 6 in October 1989. Saavedra explained this inconsistency by stating that at the time she gave the affidavit in February 1990, she could not recall when she first heard about Local 6 but that later when she spoke to her coworkers she realized that she signed the card in September 1989. Saavedra looked at the notes of Juanita Torres and Francisca Burgos to see when she heard about Local 6. Saavedra testified that she attended meetings with Ponce in a restaurant and that she and other people met outside the plant about one-half block from the factory door. Although it is clear to me that Saavedra's recollection is not exact and that she is an unreliable witness concerning dates, I shall credit Saavedra's testimony that she supported Local 6 and attended meetings in support of the Union outside the factory door. Her participation in Local 6 activities was known to Respondent because in a letter to the Region dated March 6, 1990, Respondent's then counsel wrote that Saavedra was fired for participation in the December 29 party. Thus, Respondent identified Saavedra as a supporter of Local 6 when it claimed that she was discharged for attending the party. It is significant that in 1990 Respondent did not claim that Saavedra was laid off for lack of work or because she was inebriated or a slow worker. Mere attendance at the Local 6 party was enough. At the instant hearing, Stephanie Anis and Supervisor Emil Jiminian testified that Saavedra had always been a slow worker and disobedient.[36] Respondent's own witnesses established that many of the workers are slow and refractory but that they are nevertheless the best that Respondent can find to do the work and they are not fired for their shortcomings.

I find that General Counsel has made a prima facie case that Saavedra was selected for layoff because Respondent identified her as a supporter of Local 6. Respondent has offered shifting reasons for Saavedra's layoff. I find that Respondent has not shown that, in the absence of Saavedra's

[32] A list of employees laid off in 1989 and 1990 was submitted by Respondent herein. It contains the names of 24 employees laid off around December 29, 1989.

[33] Sometime after the letter was submitted, Respondent changed counsel.

[34] Some of the employees listed are not at issue herein. The names relevant to the instant proceeding are Francisca Burgos, Lydia Saavedra, Julia Nieves, Hugo Moreta, and Jonnette Munoz.

[35] Castro denied telling Saavedra anything about the lunch.

[36] Saavedra has been employed by Respondent for 10 years.

support for Local 6, it would have selected her for layoff. Respondent had tolerated Saavedra's work habits for 10 years and it found them unacceptable only after she attended the Local 6 party. *Wright Line*, supra. Respondent thus violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl3)fiMDBUfl*ERR17*fiMDNMfl of the

Jonnette Munoz

Jonnette Munoz testified that when he was laid off, Anis told him that work was slow. Anis did not mention that Munoz had been drinking. Munoz stated that he went up to the fourth floor party and got a soda which he took home because he had to drive his wife to the laundry. Munoz testified that he signed a card to change unions at the request of Aguirre. Munoz' card is dated September 19, 1989. His affidavit given to a Board agent states that Munoz signed a card for Local 6 in October 1989, and on cross-examination Munoz testified that he signed in October 1989. However, on redirect examination by counsel for the General Counsel Munoz testified that he signed the card on September 19, 1989. This authorization card bears a Regional Office date stamp for September 25, 1989, and March 18. Munoz' affidavit states that employees met Local 6 outside the factory once a week and then went to the check cashing place to meet and discuss union benefits. Munoz testified that he met with Ponce and 10 to 15 other employees outside the factory.

It is apparent that Munoz' recollection is not good. However, I need not rely on Munoz' testimony about his activities in support of Local 6. Respondent identified Munoz as a Local 6 supporter in the statement of position dated March 6, 1990, when it asserted that he was discharged for attending the December 29, 1989 party. That statement does not mention that Munoz was an unsatisfactory worker. Thus, I find that General Counsel has made a prima facie case that Respondent selected Munoz for layoff because he supported Local 6. At the instant hearing, Respondent presented the testimony of Supervisors Joanna Benn and Emil Jiminian that Munoz talked back to Benn and did not obey. I find that Respondent cited Munoz' failings as an afterthought to justify his layoff. These failings were not stated in Respondent's letter of March 1990. Respondent had tolerated Munoz and kept him on the payroll as it did many unsatisfactory employees; I am not convinced that Respondent would have laid him off in the absence of his union activity. See *Wright Line*, supra. I find that Respondent, in violation of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl3)fiMDBUfl*ERR17*fiMDNMfl, laid off Munoz be

Munoz testified that he was recalled to work by Respondent and was requested to start on May 14, 1990. Munoz went to the plant on May 12 and told Anis that his mother was sick and that he was returning to his own country to visit her. Munoz said he would come back to work when he returned to the U.S. According to Munoz, he told Anis that he was not sure when he would be back; it could be 3 days or it could be 1 week. Anis replied that if Munoz were not here on May 14, ''that's not my problem.'' Munoz did not go back to the Company after this occasion. Munoz did not state when he returned to the U.S. The reinstatement letter, dated May 4, 1990, sent by Respondent, offers Munoz immediate reinstatement and asks him to make arrangements to return to work. It does not mention May 14, 1990, but it does ask him to respond within 14 days. Nick Anis testified that he told Munoz that he wanted to know when Munoz would return. But Munoz said he was not sure when he would return and he never came back to work. I credit the testimony of Nick Anis which is consistent with the documentary evidence. I find that Munoz told Anis he did not know when he would return. Further, Munoz did not contact Respondent when he returned from his trip and he took no steps to resume work. I do not find that Munoz was denied reinstatement after May 4, 1990.

Hugo Moreta

Hugo Moreta was laid off on December 29, 1989. Anis informed him, with Jiminian translating, that there was no more work. Moreta testified that he had attended the lunch party on the fourth floor for about 5 or 7 minutes after which he went home to have lunch with his wife. Moreta did not see any alcohol at the party and he was never accused of being drunk by Anis. Moreta did not sign a card for any union. He testified that he attended two meetings held by Local 6 outside the plant. On one occasion, Moreta was at work transferring racks from one building of the plant to another when he stopped to observe a Local 6 meeting. According to Moreta, Stephanie Anis observed him and told him to get back to work. Supervisor Jiminian testified that Moreta was lazy when he worked in shipping and that he was transferred to another department. Respondent's letter of position dated March 6, 1989, states that Moreta was discharged for attending the Local 6 party on December 29, 1989, but it makes no mention of his alleged laziness. It is apparent that Moreta was not at the forefront of organizing for Local 6; however, he was identified by Respondent as a supporter because he attended the party. I find that General Counsel has made a prima facie case that Respondent laid off Moreta because he supported Local 6. I do not believe that Respondent would have laid off Moreta in the absence of his support for Local 6; Respondent transferred Moreta from shipping when he was unsatisfactory in that position and it kept him on the payroll thereafter. Respondent admitted that it retained many unsatisfactory employees. Thus, I find that, in violation of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl3)fiMDBUfl*ERR17*fiMDNMfl, Respondent laid off Moreta because he supported Local 6. *Wright Line*, supra.

Moreta had been hired by Respondent at the end of September 1989. He worked in shipping and receiving for 2 weeks and then he worked with chemicals. Eventually, he worked throughout the entire plant wherever he was needed. Moreta received a letter in May 1990, asking him to return to work. He worked 1 day, but he did not like the task he was assigned; he had to work in the rack assembly department and he had to help unload racks. Moreta stated that the shipping job was easier and he told Anis he preferred that work; however, Anis responded that there were too many people in the shipping department as it was, and Moreta declined to continue in shipping. It is clear that Moreta quit his job 1 day after being reinstated.

Juanita Torres

Juanita Torres testified that she was laid off in December 1989.[37] According to Torres, Nick Anis told her that work was slow. She was never told that she was a slow and uncooperative worker. The position letter sent on March 6, 1990,

[37] Torres was recalled to her former job in May 1990.

by Respondent's former counsel asserts that Torres was ''[d]ischarged because of insubordination. Supervisor reported she was slow and uncooperative. Did not respond to orders.'' Nick Anis testified that Torres was a slow and uncooperative worker. He denied any knowledge of Torres' union activities. Jiminian also testified that Torres was slow. Castro stated that Torres was caught sending defective goods to a customer and that she was then transferred to the second floor where she would have less responsibility. Stephanie Anis testified that Torres had always been a slow worker. In support of General Counsel's contention that she was laid off because she supported Local 6, Torres testified that she attended meetings with Local 6 on four or five Fridays after work.[38] The meetings lasted 5 to 10 minutes. According to Torres, Nick Anis and Jiminian sometimes came to the door of the factory when employees were meeting with Local 6.[39] Torres testified that she signed a card for Local 6 on September 19, 1989. She was alone with Aguirre on this occasion; Aguirre filled out part of the card, but Torres insisted that she herself wrote the date as ''9/19/89.'' However, Torres' affidavit states that she signed the card in November 1989, and that she and other employees were with Aguirre at the time. On cross-examination by counsel for Respondent, Torres testified that she knew she might receive backpay if the instant case is successful and that she discussed with her fellow workers what would be the best things to testify to in order to win the case and get backpay.

I find that General Counsel has not made out a prima facie case that Torres was selected for layoff because she supported Local 6. General Counsel has not shown that Respondent was aware that Torres supported the Union. Torres' mere attendance at meetings in front of the factory is not enough to establish such knowledge; the meetings were attended by many employees; Aguirre testified that ''everybody'' came to meetings and Torres said about 25 people attended. Many employees went from the group that supported Local 6 to the group that supported Local 119 to hear what each had to say. Further, Respondent never identified Torres as belonging to the faction that supported Local 6. I also find that Respondent offered a consistent reason for selecting Torres for layoff; all the supervisors stated that she was a slow and inefficient worker, and Nick Anis testified that he selected the least productive employees for layoff. I do not find that General Counsel has shown that Torres' layoff in 1989 violated the Act.

Conception Quiros

Concepcion Quiros was laid off on December 29, 1989.[40] According to Quiros, Anis told her that there was no work but he did not say that she was insubordinate. Respondent's position letter of March 6, 1990, asserts that Quiros was ''[f]ired for insubordination. Would not comply with supervisor's instructions.'' Jiminian testified that Quiros was laid off when the second shift was reduced but he did not supply any reason. In support of General Counsel's contention that she was selected for layoff because she supported Local 6, Quiros testified that she signed a card for Local 6 after Aguirre gave her the card in the lunchroom. Quiros spoke to Ponce in front of the factory along with four or five coworkers; there were four meetings before the first election and one or two after that. Quiros' card is dated September 19, 1989. On cross-examination by counsel for the Respondent, Quiros testified that she first heard about Local 6 in October 1989. Her affidavit also states that she signed a card in October 1989. However, on redirect examination by counsel for the General Counsel, Quiros changed her testimony to state that she signed the card in September 1989. It is apparent that Quiros' recollection is not exact. I do not credit her testimony that she was one of only four or five employees who met with Ponce in front of the factory; other more credible testimony shows that these meetings were attended by many employees and that employees commonly went from the Local 6 group to the Local 119 group. General Counsel has not offered any evidence to show that Respondent identified Quiros as a supporter of Local 6. Therefore, I find that General Counsel has not made a prima facie showing that Respondent selected Quiros for layoff because she supported Local 6.

Julia Nieves

Julia Nieves was laid off on December 29, 1989. She testified that no one told her why she was being laid off.[41] Nieves was one of the employees named in Respondent's position letter as having been discharged for attending the Local 6 party, although Nieves denied that she was at the fourth floor party. In addition, Castro testified that she was a very slow worker. In support of General Counsel's allegation that Nieves was selected for layoff because she supported Local 6, Nieves testified that she signed a card for the union. She stated that she was not sure when she signed the card but she also testified that she wrote the date of September 19, 1989, on the card. On direct examination by counsel for the General Counsel, Nieves testified that she looked at a calendar and wrote the date and that she signed the card outside in front of the factory. On cross-examination by counsel for the Respondent, Nieves said that she was not sure when she signed her card, that she looked at the calendar in the lunchroom as she was signing it and that she signed the card outside in front of the factory, Nieves' affidavit given to a Board agent in February 1990, states that she learned about Local 6 from Aguirre in October 1989, when Aguirre asked a group of employees to complete papers to bring in Local 6. It is clear to me that Nieves was testifying by rote in this proceeding and not from her memory of any of the events: this is the only explanation for Nieves' testimony that she was in the lunchroom looking at the calendar while she signed the card and that she signed the card outside in front of the factory.[42] Nieves also testified that she attended brief meetings with Ponce in front of the factory both before and after the first election. Based on Nieves' faulty recollection and her propensity to testify without any recollection of the actual events, I would not find that General Counsel has shown that Nieves supported Local 6. However, Respondent's position letter identified Nieves as

[38] Torres' affidavit states that the meetings were attended by 25 employees.

[39] Torres acknowledged that people are always going out one door and in the other door at the factory.

[40] Quiros worked the afternoon shift from 3:30 to 8:30 p.m. on the second floor of the plant.

[41] Nieves was recalled to work in May 1990.

[42] The lunchroom is on the second floor.

one of the employees who was discharged for attending the Local 6 party. Respondent thus admitted that it regarded Nieves as a Local 6 adherent and that she lost her job for that reason. This makes out a prima facie case. Although Respondent later offered a different reason, that Nieves was a slow worker, this shifting reason offered months after the position letter does not convince me that Nieves would have been laid off in the absence of her support for Local 6. *Wright Line*, 251 NLRB 1083 (fiMDBUfl*ERR17*fiMDNMfl1980)fiMDBUfl*ERR17*fiMDNMfl, enfd. 662 F.2d 899 (fiMDBUfl*ERR17*fiMDNMfl1st cir. 1981)fiMDBUfl*ERR17*fiMDNMfl, cert. denied 455 U.S. 989 (fiMDBUfl*ERR17*fiMDNMfl1982)fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl3)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl4)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl5)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl6). Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl3)fiMDBUfl*ERR17*fiMDNMfl when it selected Nieves for layoff because she supported Local 6.

Fannie Silva

Fannie Silva was laid off on December 29, 1989. Shortly after the layoff, Respondent gave Silva an excellent letter of recommendation which stated that Silva was laid off for lack of work.[43] However, Supervisors Benn and Jiminian and Stephanie Anis all testified that Silva had always been slow and a poor worker. Nick Anis testified that the Company always gives its employees good letters of recommendation in order to avoid trouble. In support of General Counsel's contention that she was selected for layoff because she supported Local 6, Silva was shown and identified the authorization card she signed for Local 6. Silva stated that after she signed the card she attended meetings with Ponce and five or six other employees. She also attended meetings in a check cashing place after the first election. I find that General Counsel has not shown that Respondent identified Silva as a supporter of Local 6 and that she was selected for layoff because of her union sympathies. Many employees attended meetings for both unions and most unit employees signed cards for Local 6. In the absence of any further evidence relating to Silva, I cannot find that General Counsel has made a prima facie case. Further, I credit Anis' testimony that Silva was selected for layoff because she was a slow and inefficient employee even though Anis gave Silva a good recommendation several weeks after the layoff. The testimony of Nick Anis and others makes it clear that most of Respondent's employees were unskilled, minimum wage workers with little incentive to distinguish themselves in terms of production or dedication. Silva seems to have been in the general mold of Respondent's employees. There is nothing extraordinary in the fact that, under these circumstances, Anis would give Silva a good recommendation; he bore her no ill-will and it was his policy to give such letters.

Francisca Burgos

Francisca Burgos testified that she attended the Local 6 lunch on the fourth floor and was discharged on that day.[44] While the employees were eating, Anis came up to the fourth floor and he became angry when he saw all the people. According to Burgos, there was no alcohol at this lunch. On her direct examination by counsel for the General Counsel, Burgos testified that she did not receive a letter from Respondent in May 1990 asking her to return to work. However, Burgos' affidavit given to a Board agent states that she did receive the letter. When questioned about this discrepancy, Burgos maintained both that she told the truth in her affidavit and that she never received a recall letter. Burgos testified that she returned to work in November or December 1990. In fact, as Burgos acknowledged later in her testimony, Burgos fractured her hand in an accident on May 5, 1990, and she told Anis that she was unable to return to work; Anis told her to come back when she was well and she began work on December 7, 1990. Burgos testified that she signed a card for Local 6. Upon being shown her card by counsel for the General Counsel, Burgos stated that she wrote her own signature and address and that Aguirre wrote the other items including the date of September 19, 1989. Burgos testified that she signed the card in November; she and Aguirre were outside during their lunch hour. Burgos also testified that she could not recall if she signed her card before or after the election. Burgos testified that she spoke to Ponce outside the factory on Fridays, but she could not recall what year these meetings took place. Burgos voted in the election and she attended more meetings after the election. It is clear that Burgos' reliability as a witness is not great; she had trouble remembering almost everything related to her activity on behalf of Local 6, her layoff, and her recall. Respondent identified Burgos as a supporter of Local 6; it cited her attendance at the party as the reason for her layoff. At the instant hearing, Stephanie Anis testified that of all the employees at the party, she could only recall that Burgos was present. Stephanie Anis, Benn, and Jiminian all testified that Burgos was a slow worker.

I find that General Counsel has made out a prima facie case that Burgos was selected for layoff because she supported Local 6. Respondent initially said Burgos was laid off for attending the party; it was only at the hearing that Respondent claimed Burgos was laid off because she was slow. Further, Respondent has not shown that it would have laid off Burgos in the absence of activity for Local 6. Burgos was slow but so were many other employees who were retained by Respondent. Respondent did not cite Burgos' failings as a reason for her layoff in its letter written soon after the fact. Instead, it cited only her attendance at the party. Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl3)fiMDBUfl*ERR17*fiMDNMfl when it selected Burgos for layoff. *Wright Line*, supra.

G. *The Second Layoff on December 28, 1990*

Anis testified that all the employees laid off in 1989 had been brought back because the Company feared incurring a large liability in the NLRB proceedings. However, according to Anis, the employees were still very slow and Respondent did not have enough work. As a result, Anis was obliged to lay off some employees again at the end of 1990.[45] Anis explained that by December 1990, the Company had lost three customers amounting to almost $800,000 in business. Respondent thereafter operated with 58 employees down from a high of over 100 employees. According to Anis, he did not lay off the employees in order of seniority because there was no collective-bargaining agreement in effect and he was free to keep only the best workers.

[43] Silva was recalled in May 1990.

[44] Burgos erroneously placed this event on December 12 or 18, 1989.

[45] Respondent introduced an exhibit listing 42 employees who were laid off beginning on December 17, 1990.

Saavedra, Torres, Quiros, Nieves, and Silva

Some of the employees laid off in 1989 and recalled thereafter were again laid off in December 1990. These employees testified as follows:

Saavedra testified that after she was recalled to work in May 1990 to her old shift and the same job, she was laid off again on December 28, 1990. Anis told her that work was slow. At the time of the instant hearing, Saavedra had been recalled to work by Respondent.

Torres stated that she was laid off in December 1990 because work was slow. She was recalled to work in March 1991. At that time, Torres was in the hospital and she sent Anis a certified letter explaining that she could not return to work. Torres testified that at the time of the instant hearing she had not yet been told by her doctor that she should resume her job.

Quiros was laid off on December 27, 1990, when Anis discontinued the night shift because there was not enough production.

Nieves was laid off on December 27, 1990; she was told that the night shift was being closed down.

Silva was laid off in December 1990, and was recalled in March 1991.

General Counsel urges that these five employees were laid off again in 1990 because they supported Local 6. However, these layoffs are far different from the layoffs of 1989. General Counsel has not presented any evidence that after the employees were recalled they engaged in any activities in support of Local 6. Nor is there any evidence that Respondent harbored antiunion animus against these employees once they returned to work. Further, Nick Anis provided detailed testimony about the loss of $800,000 worth of customer orders by the end of 1990. He also provided testimony and documentary evidence that the Company eliminated the night shift and reduced its staff by almost half. I find that General Counsel has not made out a prima facie case that Saavedra, Torres, Quiros, Nieves, or Silva were laid off in December 1990, because they engaged in any union activities. I also find that Respondent has presented uncontradicted evidence that it had economic reasons for the layoff of 1990.

Burgos[46]

Burgos was laid off in December 1990 and she was recalled to work on March 11, 1991. Burgos went back to work at her job on the second floor, but on the next day she was assigned to perform inspection work on the first floor. Also on that day, Burgos was given a written warning notice by Anis stating that she was slow in her work and that the Company was ''trying you at another location to see if you can improve your productivity.'' The notice stated that it was given in accordance with the new contract with Local 119. Burgos showed the letter, which was in both English and Spanish, to a neighbor, Jose Garcia Vasquez. Burgos testified that she heard Vasquez call the Company and tell them to treat her better because she would have a heart attack. On March 13, she met in the company office with Nick Anis, Stephanie and Marilyn Anis, and Castro. Anis informed Burgos that she was not producing and that he wanted production. Anis told her that he was unhappy with the phone call he had received from Vasquez which he claimed had been threatening to his wife. He said he would call the police. Burgos testified that she felt bad and that her blood pressure went up. Burgos said she would call the police because Anis was attacking her. When asked to explain how Anis was attacking her, Burgos replied that it was because he kept telling her to produce. Finally, Burgos said, Anis told her to punch her card.

Nick Anis testified that he brought Burgos down to the first floor after complaints by Benn that Burgos was slow and was slowing the other employees. The day after Burgos was given a warning letter about her work, Anis' wife told him that she had received a telephone call in the office about Burgos. The person said, ''You're making her very nervous, you're gonna be very sorry, it's gonna cost you an awful lot of money.'' Anis took this as a threat and the next day he told Burgos that if she had problems she should speak to him about them but that she could not make threats. Burgos replied that she did not like working under Castro's supervision because Castro made her nervous. She wanted to work on the second floor as she had been doing for years. Burgos also said that Anis was threatening her. Anis replied that he was not threatening Burgos, but that if his wife received any more phone calls he would call the police. At this point, Burgos said she was going to call the police and she walked out. When Anis went to look for her, he saw Burgos walking out and he told her to punch out. Anis testified that Burgos quit when she went home that day. Respondent sent Burgos a letter documenting the events and stating that it was assumed that Burgos had quit when she walked out. Burgos did not respond.

As stated above, I do not find that General Counsel has shown that the layoffs of December 1990 were unlawful. Thus, I find that Burgos was not unlawfully selected for layoff in 1990. Further, General Counsel has not shown that Respondent unlawfully discharged Burgos on March 13, 1991. The facts show that Nick Anis told Burgos that he did not want strangers making threatening calls to his wife and that Burgos responded that she would call the police and then walked out. When the Company sent Burgos a letter after she walked out, Burgos did not communicate to Respondent that she had not quit and that she still wanted her job. I find that Respondent was justified in assuming that Burgos had quit her job.

Perez

Perez was laid off in December 1990. She was told work was slow. Perez testified that she was on the negotiating committee for Local 119 in October and November 1990. Generally, Perez did not speak at the negotiating sessions, but on one occasion she asked the union representative why the employees were going to lose 10 minutes at the end of the day. Sometime in December 1990, Perez was called to the office where she met with Jiminian and Anis. Perez testified that Anis said ''you used to work well and you have a good head, but now that you are with the Union you have a big head.'' Perez said she had not changed and that she was not feeling well and had some problem with her kidneys. Anis said everything was fine and there was no prob-

[46] Respondent has pointed out that General Counsel did not amend the complaint to allege specifically that Burgos was unlawfully discharged on March 13, 1991. However, the matter was fully litigated at the instant hearing.

lem. Perez acknowledged that Anis was polite and he was not angry; this was a friendly conversation.

Stephanie Anis testified that when Perez was first hired, she requested that Perez be given inspection tasks because Perez showed initiative. According to Stephanie Anis, Perez' attitude changed after a period of time, ''she became involved with something to do with the union.'' Stephanie Anis testified that Perez said she did not check items because she did not feel well; in addition, she took too long to complete her assignments. When she was instructed to do something, according to Stephanie Anis, Perez would ask to be excused from the work because she did not feel well that day. Anis linked this change to the time when she heard that Perez was shop steward for Local 119. Stephanie Anis was at the meeting when Nick Anis asked Perez to change her attitude. But Perez did not change her attitude; she continued to complain of physical ailments and eventually Perez was removed from the inspection department and then she was laid off.

Nick Anis testified that he selected Perez for layoff because Stephanie Anis informed him the Perez' work was terrible. Anis denied that his decision had anything to do with Perez' position on the negotiating committee; other employees who served on the committee are still employed by Respondent.

It is significant that Nick Anis did not deny telling Perez that she used to work well but that since she has been with Local 119 she has a big head. Further, Stephanie Anis linked the decline in Perez' work performance to her involvement with the Union. Based on these facts, I find that Respondent warned Perez that it considered her to be a poor worker since she became involved with the Local 119 negotiating committee. Respondent thus violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl1)fiMDB
Further, the testimony of Nick and Stephanie Anis shows that they followed up on this warning by selecting Perez for layoff in December 1990. I am convinced that Perez was laid off because she was active on the committee; both Nick and Stephanie Anis testified that her unsatisfactory work was connected to her union activities. Thus, I find that General Counsel has made out a prima facie case that Perez was selection for layoff because she supported Local 119. Although the evidence shows that Perez may have been sick at some time and that this may have affected her performance, Respondent has not shown that her performance was so poor that she would have been laid off even had she not engaged in union activities. In this connection, I am mindful of the fact that over the years Respondent has retained many employees about whom it had work-related complaints. Thus, I find that Respondent violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl3)fiMDBU
lected Perez for layoff. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. By informing Maria Aguirre that it was changing her work station so that it could keep her union activities under surveillance and by placing Aguirre under closer supervision, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl1)fiM
and Section 2(fiMDBUfl*ERR17*fiMDNMfl6)fiMDBUfl*ERR17*fiMDNMfl and (fiMDBUfl*ERR17*fiMDNMfl7)fiMDBUfl*ERR17*fiMDNMfl o

2. By selecting the following employees for layoff in December 1989 because they supported Local 6, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl3)fiMDBUfl*ERR1
Lydia Saavedra, Jonnette Munoz, Hugo Moreta, Julia Nieves, Francisca Burgos.

3. By selecting Maria Perez for layoff in December 1990, because she supported Local 119, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMD

4. Respondent did not engage in unfair labor practices other than those found herein.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily selected certain employees for layoff in December 1989 and December 1990, it must make them whole for any loss of earnings and other benefits from the dates of their layoffs to the dates of their recall. In the case of Maria Perez, who had not been recalled as of the instant hearing, she must be made whole until the date of a proper offer of reinstatement. The loss shall be computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (fiMDBUfl*ERR17*fiMDNMfl1950)fiMDBUfl*ERR17*fiMDNMfl, plus interes
Retarded, 283 NLRB 1173 (fiMDBUfl*ERR17*fiMDNMfl1987)fiMDBUfl*ERR

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Plated Plastic Industries, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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changed so that their union activities may be placed under surveillance and placing employees under closer supervision because of their union activities.

(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ERR17*fiMDNMfl Selecting emp
union.

(fiMDBUfl*ERR17*fiMDNMflc)fiMDBUfl*ERR17*fiMDNMfl In any like or
ing, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl Make whole
discriminatorily selected for layoff in December 1989, in the manner set forth in the remedy section above: Lydia Saavedra, Jonnette Munoz, Hugo Moreta, Julia Nieves, Francisca Burgos.

(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ERR17*fiMDNMfl Offer Maria P
her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed

(fiMDBUfl*ERR17*fiMDNMflc)fiMDBUfl*ERR17*fiMDNMfl or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(fiMDBUfl*ERR17*fiMDNMfld)fiMDBUfl*ERR17*fiMDNMfl attached notice marked ''Appendix.''[48] Copies of the notice, in both English and Spanish, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(fiMDBUfl*ERR17*fiMDNMfle)fiMDBUfl*ERR17*fiMDNMfl from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''